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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2062

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioners

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3-11
Reasons for Granting the Writ	11-14
Conclusion	14

Appendices

A. Order, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Ct.Cl. App. No. 17-72, March 29, 1974	1a
Concurring opinion of Judge Nichols	3a
Denial of Motion for Rehearing, May 31, 1974	6a
B. Opinion, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 28 Ind. Cl.Comm. 264 (1972)	1b
C. Opinion, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 390 F.2d 686 (1968)	1c
D. Opinion, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 16 Ind. Cl.Comm. 342 (1965)	1d
E. Act of June 1, 1910, 36 Stat. 455	1e

TABLE OF AUTHORITIES

Cases Page

Armstrong v. *United States*, 364 U.S. 40 (1960) . 5
Big Eagle v. *United States*, 323 F. Supp. 60 (D.S.D. 1971) 13
Chippewa Indians v. *United States*, 301 U.S. 358 (1937) 7
Ft. Peck Indians v. *United States*, 132 Ct. Cl. 373, 132 F. Supp. 222 (1955) 7
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 7, 12
Monongahela Nav. Co. v. *United States*, 148 U.S. 312 (1893) 5, 12
Raylaine Worsteds, Inc. v. *United States*, 137 Ct. Cl. 54, 146 F. Supp. 723 (1956) 11
Shoshone Tribe v. *United States*, 299 U.S. 476 (1937) 5, 7, 9, 12
Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, 16 Ind. Cl. Comm. 342 (1965) ..... *passim*
Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968) ..... *passim*
Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, 28 Ind. Cl. Comm. 264 (1972) ..... *passim*
Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, Ct. Cl. App. No. 17-72, March 29, 1974 ..... *passim*
United States v. *Klamath Indians*, 304 U.S. 119 (1938) 5, 9, 12
United States v. *Shoshone Tribe*, 304 U.S. 111 (1938) 9

Statutes

Act of June 1, 1910, 36 Stat. 455 ..... *passim*
28 U.S.C. § 1255(1) 2
Fifth Amendment, U.S. Constitution ..... *passim*

Miscellaneous

Moore, *Federal Practice* (1965) 11

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v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Three Affiliated Tribes of the Fort Berthold Reservation ("the Tribes") respectfully petition for a writ of certiorari to review a judgment of the United States Court of Claims.

OPINIONS BELOW

This case has been the subject of four prior decisions as follows:

(a) The memorandum order of the Court of Claims, on which the writ is sought, is not yet reported: *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, Ct. Cl. App. No. 17-72, March 29, 1974;

(b) *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 28 Ind. Cl. Comm. 264 (1972);

(c) *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968);

(d) *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 16 Ind. Cl. Comm. 341 (1965),

These opinions are reproduced as Appendices A, B, C and D to this petition.

JURISDICTION

The order of the Court of Claims of which the Tribes seek review was entered on March 29, 1974. The Court's order denying the Tribes' motion for rehearing was entered on May 31, 1974, see Appendix 6a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether Indians, whose property is unilaterally taken by act of Congress for public purposes, are entitled to just compensation under the Fifth Amendment of the Constitution, or whether, as the Court of Claims held, they, because they are Indians, are limited to a lesser form of compensation.

2. Whether Congress can be acting "in good faith" as trustee of a tribe when it unilaterally sells the tribe's land to settlers at giveaway prices, land the tribe badly needs to support its ranching economy.

3. Whether it is a denial of Due Process for an appeals court to draft a new and unprecedented test of just compensation, without giving the appellants an opportunity to produce evidence to show that the facts of their case meet the new test.

STATUTES INVOLVED

Act of June 1, 1910, 36 Stat. 455 (reproduced as Appendix E).

The Fifth Amendment to the Constitution of the United States, which reads in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

The 1910 Act

This claim arises under the Act of June 1, 1910, 36 Stat. 455, and supplemental legislation, under which the United States, without the consent and in disregard of the desires and needs of the Fort Berthold Tribes, opened the northern half of the Fort Berthold Reservation to public settlement. The Act granted some of the opened land to the State of North Dakota for an arbitrary fixed price; granted one parcel to a church without any compensation to the Tribes; took one parcel for a national monument; and provided that the balance of the opened lands be sold off to settlers under the homesteading laws, with the proceeds to be credited to the Tribes. The prices paid by the settlers for the homestead lands were based on an appraisal system set up by Sec. 7 of the Act, a system which turned out to be heavily biased in favor of the settlers, as shown by the fact that, as the Indian Claims Commission found, 28 Ind. Cl. Comm. at 278, App. 13b, the prices set by the commission and paid by the settlers were only about a *third* of the true fair market value of land in that area at that time.[1] Virtually all of

[1] The pro-settler bias may well have been due to the fact that the Act (Sec. 7) placed a representative of the settlers on the

the 1910 homestead parcels were sold within approximately a year of their opening date, an indication of both the high settler demand for the land and its bargain price. 16 Ind. Cl. Comm. 355. The Tribes consented to none of this.

The Tribes have been awarded just compensation for the land given to the state, the church, and the national monument. They seek review only of the Court of Claims' decision denying just compensation for the land given to the settlers.

The Homestead Provisions Were a Taking

The purpose of the homesteading laws was to encourage the population and agricultural development of the western frontier by providing cheap land to settlers on terms which allowed them to finance their property through the income they earned from working the land. Because the 1910 Act was a supplement to the homestead legislation, it contained many provisions designed to help the settlers which, as it happened, were at the expense of the Tribes. These included out-and-out donations of some of the land and some of the sale proceeds to the local white communities for such purposes as schools and parks (Sec. 6); the settlers paid in installments without interest to the Tribe (Sec. 9); the Tribes were charged for all selling and surveying costs (Sec. 12); and of course the pro-settler appraisal system mentioned above cost the Tribes dearly.

The 1910 Act effectively and unilaterally deprived the Tribes of a large portion of their reservation in fulfillment of a public purpose, *viz.*, making cheap land available to the immigrants then pouring into the country. Under the precedents established by this Court, all of

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appraisal commission (the other members of the commission were an Indian and a BIA employee).

the elements are present for a taking for which the Tribes are entitled to just compensation under the Fifth Amendment to the Constitution. *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312 (1893); *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Klamath Indians*, 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937).

The Court of Claims' 1968 Opinion Was Wrong and Should Be Set Aside

The Tribes have recovered a judgment of $2,765,067 for the true net value of their homestead lands[2] as of the times they were sold. However, they were denied the interest which just compensation awards to one whose property is taken under the Fifth Amendment, because the Court of Claims held in its 1968 opinion that the homestead lands were not "taken" in the Constitutional sense.[3] The Court found that the ordinary rules governing what constitutes a Fifth Amendment taking do not apply in the case of Indian tribes, because of the government's special trust relationship to the tribes. Rather, the court devised a totally new and unprecedented "good faith effort" test, by which it intended to distinguish acts of trust management of Indian property from sovereign condemnation of Indian property. Under this test, property of Indian tribes is not "taken" within the meaning of the Fifth Amendment, where the government makes a "good faith effort" to pay the Indians the full value. The Court said:

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[2] In addition, they recovered $4,840,019 in interest at 3%, this being the rate specified in the statute for the proceeds of sale after deposit in the Treasury. In addition, they recovered $1,203,971 for the loss of lands to the state, the church, and the national monument. App. 35b.

[3] If the Tribes had been awarded just compensation, their recovery would have borne interest at 5% instead of 3%, which would have added about $3,200,000 to their recovery.

> "Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee." 309 F.2d at 691, App. 8c.

The fact that the "good faith effort" may in fact completely fail to obtain fair market value, or that the purpose for which the property was taken was not to benefit the tribe but to fulfill a public objective are irrelevant under the Court of Claims' test.

In essence, the "good faith effort" test carves out an exception to the Fifth Amendment, which deprives Indians, and Indians alone, of the full protection of the just compensation clause, on the ironic basis that the government has a special fiduciary responsibility to protect Indian interests. In other words, under the Court of Claims test, it is as if the Fifth Amendment reads—

> ". . . nor shall private property be taken for public use, without just compensation, except when the property belongs to an Indian tribe, and a good faith effort is made to pay the tribe the full value of the property."

Applying its new "good faith effort" test to a record never designed to explore the good faith of Congress, the Court of Claims then proceeded to find as a fact that Congress had indeed made a good faith effort (by setting up the appraisal system) to see that the Tribes were fairly paid for their land. 390 F.2d at 694, App. 13-14c. Therefore, there was no taking. The court considered neither the purpose of the 1910 Act, nor any of its pro-settler provisions, nor its results in fact, all of which confirmed what anyone would have assumed, that while Congress did not intend to cheat the Indians, it certainly was acting for the primary benefit of the settlers,

not the Indians; hence was acting as a sovereign, not a trustee.

Instead, the court's rationale was chiefly devoted to distinguishing between two lines of cases; one which holds that Congress has plenary power over Indian properties, and the other affirming the government's obligation to pay just compensation when it takes Indian land in the Constitutional sense. The court decided that the cases could be distinguished on the basis that in those allowing just compensation, Congress had not made a "good faith effort" to transmute the Indians' property into its full money value. What the court completely failed to see was that it was dealing with parallel rather than divergent lines of authority.

There is no question that Congress has the plenary power to deal with Indian property.[4] Congress frequently exercises this power, as a trustee, to change Indian assets from one form to another for the benefit of the tribe, as, for example, selling Indian timber, and at least where there is no breach of trust responsibility, the tribe has no recourse.[5] However, Congress, as sovereign, also has the plenary power to take the property of an Indian tribe for the benefit of the public as a whole. This power is the sovereign's power of eminent domain, and applies to all private property, Indian and non-Indian alike. When Congress acts as sovereign for the public good, and not as trustee for the Indians' benefit, the Indians do have recourse, namely the right of just compensation. As this Court unanimously said in another case, where the Government gave one tribe the right to occupy part of another tribe's reservation:[6]

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[4] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Chippewa Indians* v. *United States*, 301 U.S. 358, 375 (1937).

[5] *Fort Peck Indians* v. *United States*, 132 Ct. Cl. 373, 132 F. Supp. 222 (1955).

[6] *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497-8 (1937).

> "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564, 565, 566. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation.' *United States* v. *Creek Nation*, *supra*, p. 110; citing *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307-308. . . . Spoliation is not management."

The *Shoshone* case states the law. When, under the 1910 Act, Congress unilaterally sold the Tribes' lands to settlers at prices far below their fair value in order to provide cheap land to the settlers, Congress obviously acted as sovereign, not trustee, and the Tribes are entitled to just compensation. The Court of Claims decision to the contrary should be reversed.

The Tribes Have Been Denied Due Process

Even assuming arguendo that the Court of Claims' "good faith effort" test is valid, we respectfully suggest that the manner in which it has been applied in this case raises a serious question of Due Process. This case has been the subject of two major trials (one on liability and one on valuation), and an appeal from each. It might be assumed that this proves that the Tribes' case has been thoroughly considered. But this is not true; on the just compensation issue, one of the Tribes' main points throughout the case, the Tribes were arbitrarily prevented in two different ways from having their day in court.

Law of the Case. In the first trial (limited to liability), the Commission determined that the Tribes had a compensable interest in the lands disposed under the 1910 Act. However, without any mention of the Tribes' just compensation argument, the Commission held that in order to prevail the Tribes must prove that the moneys received from the disposition of the subject lands were so far below the fair market value that the United States was "guilty of either fraudulent conduct or gross negligence amounting to a breach of its fiduciary obligations. . ." 16 Ind. Cl. Comm. 391, App. 19d. The Tribes took an interlocutory appeal,[7] disputing the failure to find a right of just compensation. Under the precedents then prevailing,[8] the only elements necessary to prove a Fifth Amendment taking were that the Indians had title and that Congress deprived them of it for a public purpose without their consent. Therefore, when the case reached the Court of Claims, the record contained merely a relatively few exhibits which tended only to show whether or not the Indians had consented to the 1910 Act itself. Neither of the parties had attempted to explore Congress's "good faith effort" to see that the Tribes were fairly paid, since obviously neither party could have foreseen the relevance of this question.

The court not only created the new test without benefit of argument by the parties, but *went on to apply it*, notwithstanding the fact that no evidence relevant to the new test had been intentionally introduced. The danger of making findings in advance of the evidence was well illustrated by what came out in the trial on remand, where the Tribes proved beyond any doubt that even under the court's new test they were entitled to just compensation. The Tribes showed that Congress

[7] As is their right under 25 U.S.C. § 70(s).

[8] E.g., *Shoshone Tribe* v. *United States*, note 6 above; *United States* v. *Klamath Indians*, note 13 below.

clearly had acted for the benefit of the settlers, and contrary to the wishes and best interest of the Tribes[9] and that the Act was so biased in favor of the settlers that pursuant to its machinery the Indians only received a third of the value of their lands.[10] In the face of this evidence, it is a gross mockery to hold, as the Court of Claims did in its 1968 opinion, before it knew what the facts were, that the 1910 sale "merely transmute[d] the property from land to money" or was a "mere substitution of assets or change of form." 390 F.2d at 691, App. 8c.

While the Commission let the Tribes' evidence into the record on remand, it refused to consider it, on the ground that it was bound by the law of the case doctrine to the Court of Claims' earlier finding that the homestead lands were not "taken" within the meaning of the Fifth Amendment. The Tribes then appealed to the Court of Claims, which affirmed without opinion.

As a result, this historic litigation has ended with a finding that when Congress sold part of the Fort Berthold Reservation to settlers at a third of its value, it acted as trustee for the benefit of the Tribes; whereas it is incontestable on this record that the Tribes' land was sold for the benefit of the settlers, and that Congress had no real concern for the Tribes' best interest.

This is an insult to history as well as Due Process, and was committed in the name of law of the case, a

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[9] The Tribes' expert witness testified without contradiction that the lands sold to the settlers were vital to the Indians' ranching economy, and that they were disposed of over the protests of the Tribes for the benefit of white settlers and in furtherance of national homesteading policy.

[10] 28 Ind.Cl.Comm. at 278, App. 14b.

doctrine which does not require any such result.[11] The Tribes have been denied Due Process.

Denial of Rehearing En Banc. The Tribes were also denied Due Process in their efforts to show the Court of Claims that it was wrong in its 1968 appellate finding of fact that the "good faith effort" test had been met. That finding was made by an *en banc* court, at a time when the Court of Claims decided all of its cases *en banc*. Therefore, only an *en banc* court could reconsider the finding. However, in 1973 the court started sitting in panels. Prior to the oral argument the Tribes moved that the case be heard *en banc*, so as not to be faced with the futility of urging a panel to correct the finding of fact made by the full court in 1968. This was denied, as was the Tribes' post-decision motion that the judgment be reconsidered *en banc*. Thus, the Tribes' appeal was an exercise in futility and a denial of Due Process.

Because of the denial of Due Process, the case should be remanded with instructions to consider the Tribes' evidence on the merits, and to enter such judgment as may be warranted by the evidence.

REASONS FOR GRANTING THE WRIT

1. The Court of Claims' "good faith effort" test is wrong, and contrary to the precedents established in this Court's decisions on just compensation, in both non-

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[11] As even the Court of Claims has on occasion recognized, see *Raylaine Worsteds Inc.* v. *United States*, 137 Ct.Cl. 54, 146 F.Supp. 723 (1956), and see 1B Moore, *Federal Practice* ¶ 0.404[10], pp. 573-74 (1965).

Indian [12] and Indian cases.[13] Moreover, the "good faith effort" test is discriminatory—it attempts to set up a just compensation standard solely for Indians, despite the fact that there is nothing inherent in the ownership of Indian property which renders inapplicable the normal just compensation standards developed by this Court.[14] Indians, if the Court of Claims' "good faith effort" test is to stand, will be put to a much harder burden of proof in any claim they make for a Fifth Amendment taking, than other claimants. Under this test, Congress can condemn tribal land, but then all it has to do to deprive Indians of their right to just compensation is to set up some apparently reasonable machinery for compensating them. Then, if the machinery does not work properly, they can recover for the condemned lands only by proving gross negligence or fraud, obviously a different and far more difficult burden than under the normal just compensation standards, and even then they would not receive the interest to which a condemnee is entitled under the Fifth Amendment. In the present case this amounts to a $3 million loss to the Tribes.[15]

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[12] In *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 327 (1893), this Court said that it is for the courts, not Congress, to determine what just compensation is in a given case. Yet under the "good faith effort" test, the court must accept as "just compensation" whatever Congress decrees that the Indians shall be paid, provided that Congress made a good faith *effort* to see that the Indians were properly paid.

[13] In *United States* v. *Klamath Indians*, 304 U.S. 119 (1938), the Government pursuant to an act of Congress conveyed 87,000 acres of tribal land to a private road company, without the consent of the tribe. The tribe was paid $108,750, though the land was worth much more. *Held*, tribe entitled to just compensation. This Court certainly did not lay down any test dependent on Congress's "good faith" in paying the tribe $108,750.

[14] E.g., see the *Shoshone* case quoted at p. 8 above.

[15] Moreover, the decisions of this Court cast serious doubt upon whether the good faith of the legislature is subject to judicial attack. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 568 (1903) ("the judiciary cannot question or inquire into the motives which

The court's test will have far-reaching effects on future Indian claims for taking of their property. The government's trusteeship over Indian tribes and their property is still in full force and effect for most tribes today, and examples of direct and indirect condemnation of Indian property continue to occur every year. If this Court fails to review the instant case, it will not only perpetuate an injustice for these petitioners, but will make it necessary for future, similarly situated condemnees to petition this Court until there is a definitive ruling.

Furthermore, the Court of Claims' rationale is at odds with at least one recent lower court case.[16] Until the question is resolved by this Court there will be confusion as to the correct law.

2. The Court of Claims' retroactive application of its new and unforeseeable "good faith effort" test creates a fundamental Due Process question which transcends the boundaries of Indian law. The essence of Due Process is a full and fair hearing in which both parties have the opportunity to develop evidence relevant to the determining principles of law. A party is entitled to know before

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prompted the enactment of this legislation"). The rule is that Congressional integrity is presumed, *id.* at 568, in which case the Indians are given a hollow remedy: they can win only by successfully attacking that which is invulnerable.

[16] *Big Eagle* v. *United States*, 323 F.Supp. 60 (D.S.D. 1971). In that case, which involved a taking for a dam, the Indians were dissatisfied with the amount tendered and sued for just compensation. Citing the Court of Claims' 1968 decision (which we are asking this court to review) the court held that where—

> ". . . the underlying purpose for the acquisition of Indian land is the necessity for its use in a public project, the government cannot be said to be acting in the capacity of trustee for the interests of the Indian wards. A fifth amendment taking has occurred, which, as pointed out above, automatically includes a promise of just compensation, including interest." At 62.

trial, not after, the principles of law which will determine the outcome of his case. If the court lays down new law calling for facts not theretofore in issue, the parties are out of common fairness entitled to a further trial for the purpose of resolving those facts, and it is a denial of Due Process for the court to make findings based largely on speculation, and then refuse to change those findings when the later-introduced evidence shows they were wrong.

This denial of Due Process was compounded by the refusal of the court to allow the second appeal to be held *en banc*. Without an *en banc* court in 1974 to reconsider the finding of fact by the *en banc* court in 1968, the 1974 appeal was futile.

When the Court of Claims itself commits a denial of Due Process, redress can be had only in this Court. Certiorari should therefore be granted to protect the integrity of the judicial process in the Court of Claims.

CONCLUSION

For the reasons stated, the Three Affiliated Tribes respectfully request that a writ of certiorari be issued to review the judgment of the Court of Claims.

Respectfully submitted,

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